

# Florida State University Law Review

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Volume 28 | Issue 2

Article 6

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2001

## Oem or Non-Oem Automobile Replacement Parts: The Solution to *Avery v. State Farm*?

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### Recommended Citation

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<http://ir.law.fsu.edu/lr/vol28/iss2/6>

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# FLORIDA STATE UNIVERSITY LAW REVIEW



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*Matthew W. Rearden*

VOLUME 28

WINTER 2001

NUMBER 2

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Recommended citation: Matthew W. Rearden, *Oem or Non-Oem Automobile Replacement Parts: The Solution to Avery v. State Farm?*, 28 FLA. ST. U. L. REV. 543 (2001).

# OEM OR NON-OEM AUTOMOBILE REPLACEMENT PARTS: THE SOLUTION TO *AVERY V. STATE FARM*

MATTHEW W. REARDEN\*

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## I. INTRODUCTION

Would you pay \$101,355 for a \$23,263 Toyota Camry? If you built that car using only Original Equipment Manufacturer (OEM) parts from Toyota, that is how much it would cost.<sup>1</sup> Even more shocking, the \$101,355 would not even include paint or the labor required to assemble the vehicle.<sup>2</sup> But a recent Illinois case—*Avery v. State Farm Mutual Automobile Insurance Co.*<sup>3</sup>—has effectively mandated the use of OEM parts when insurance companies repair damaged vehicles.<sup>4</sup>

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1. See Press Release, Alliance of Am. Insurers, Rebuilt Camry Costs 4x Retail Price, Proving OEM Auto Parts Are \$7.2 Billion Rip-Off, Alliance Study Finds (July 30, 1999) [hereinafter AAI, Rebuilt Camry].

2. See *id.*

3. No. 97-L-114, (Ill. Cir. Ct. Oct. 8, 1999), available in WESTLAW, 1999 WL 955543 (Count I); No. 97-L-114, 1999 WL 1022134 (Count II), *appeal docketed*, No. 5-99-0830 (Ill. App. Ct. Dec. 21, 1999), and *motion for direct appeal denied*, No. 88833. Count I pertained to plaintiffs' breach of contract action. See 1999 WL 955543, at \*1. Counts II and III addressed plaintiffs' claims under an Illinois consumer fraud and deceptive business practices statute. See 1999 WL 1022134, at \*1.

4. See 1999 WL 1022134, at \*5.

Not suprisingly, *Avery* has sent shock waves through the automobile insurance community and could cause the amount of insurance premiums to skyrocket. As one journalist noted:

The stakes in this battle are enormous, given the estimated 35 million automobile accidents that occur in the U.S. each year. The crash parts used to repair wrecked vehicles cost about \$9 billion, money that is paid largely by insurers and financed by the premiums paid by all motorists.<sup>5</sup>

This Note will first analyze the potentially groundbreaking case of *Avery* before discussing its ramifications for automobile insurance companies and their policyholders. *Avery* has engendered an important debate regarding the use of non-Original Equipment Manufacturer parts (non-OEM), and it may lead to significant premium increases for the insurance-consuming public. This Note will analyze the issues associated with the use of non-OEM parts, and upon reaching the conclusion that their use should be retained, it will offer a possible solution to the problem that can be implemented extrajudicially and within the existing legislative scheme by the insurers themselves. In the event that the insurers choose not to implement the proposed solution, the Florida Legislature should consider mandating the proposed solution.

## II. *AVERY V. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.*

The plaintiffs in *Avery* were State Farm policyholders who claimed that by repairing their wrecked vehicles with non-OEM automobile parts rather than using OEM parts, State Farm failed to return their cars to “pre-loss condition” as required by their insurance policies.<sup>6</sup> On October 4, 1999, the jury rendered a verdict in favor of the plaintiffs, finding that State Farm breached its contracts with the plaintiffs, and the jury awarded the plaintiffs \$456 million.<sup>7</sup> In addition, the trial court awarded the plaintiffs \$130 million—the amount of direct savings that State Farm realized from its practice of using non-OEM parts.<sup>8</sup> The trial court also awarded the plaintiffs \$600 million in punitive damages for violation of the Illinois Consumer Fraud and Deceptive Business Practices Act.<sup>9</sup> Totalling almost \$1.2 billion, the judgment in *Avery* is reportedly the

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5. See Ralph Vartabedian, *Losers in State Farm Case May Be Consumers*, L.A. TIMES, Oct. 21, 1999, at W1, 1999 WL 26187710.

6. See *Avery*, 1999 WL 1022134, at \*1. See *infra* notes 92-94 and accompanying text for an in-depth discussion of the difference between OEM and non-OEM parts.

7. See 1999 WL 955543, at \*1.

8. See 1999 WL 1022134, at \*4.

9. See *id.*; see also 815 ILL. COMP. STAT. 505/1-12 (West 1997).

largest judgment ever against an insurance company in the United States.<sup>10</sup>

State Farm filed a notice of appeal to the Illinois Appellate Court.<sup>11</sup> In addition, State Farm filed a motion for direct appeal to the Illinois Supreme Court, requesting the state supreme court to bypass the intermediate appellate court.<sup>12</sup> The Illinois Supreme Court denied State Farm's motion for direct appeal.<sup>13</sup> Consequently, the case remains on appeal at the Illinois Appellate Court.

The plaintiffs benefited from a number of the trial court's generous rulings. Foremost was the trial court's decision to certify the plaintiff class as comprised of the following members:

All persons in the United States, except those residing in Arkansas and Tennessee, who, between July 28, 1994, and February 24, 1998, (1) were insured by a vehicle casualty insurance policy issued by Defendant State Farm and (2) made a claim for vehicle repairs pursuant to their policy and had non-factory authorized and/or non-OEM (Original Equipment Manufacturer) "crash parts" installed on their vehicles or else received monetary compensation determined in relation to the cost of such parts. Excluded from the class are employees of Defendant State Farm, its officers, its directors, its subsidiaries, or its affiliates.

In addition, the following persons are excluded from the class: (1) persons who resided or garaged their vehicles in Illinois and whose Illinois insurance policies were issued/executed prior to April 16, 1994, and (2) persons who resided in California and whose policies were issued/executed prior to September 26, 1996.<sup>14</sup>

As a result of the court's decision to certify the plaintiff class, the plaintiffs did not have to show that each individual class member suffered harm.<sup>15</sup> The plaintiffs were "not required to prove *which* members of the class suffered an economic loss or the extent of any individual's loss."<sup>16</sup> Nor were plaintiffs required to prove the preloss condition of any individual vehicle or that any specific non-OEM part was of lesser quality.<sup>17</sup> Based on these rulings, it was highly probable

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10. See Memorandum of State Farm Mut. Auto. Ins. Co. at 1, *Avery v. State Farm Mut. Auto. Ins. Co.*, No. 88853 (Ill. Feb. 24, 2000). This brief was filed in support of State Farm's motion for direct appeal to the Illinois Supreme Court. The motion was denied.

11. See Notice of Appeal, *Avery v. State Farm Mut. Auto. Ins. Co.*, No. 97-L-114, (Ill. App. Ct. Oct. 8, 1999) The appeal was filed on December 7, 1999, with the Fifth District Appellate Court.

12. See Motion of State Farm Mut. Ins. Co. for Direct Appeal, *Avery v. State Farm Mut. Auto. Ins. Co.*, No. 88853 (Ill. Feb. 24, 2000). The motion was filed January 20, 2000.

13. See *Avery v. State Farm Mut. Auto. Ins. Co.*, No. 88853 (Ill. Feb. 24, 2000).

14. *Avery*, 1999 WL 1022134, at \*1, \*2.

15. See Memorandum of State Farm Mut. Ins. Co. at 16, *Avery* (No. 88853).

16. *Id.*

17. See *id.*

that some members of the class would recover without any showing of loss.

Prohibiting State Farm from informing the jury that its policyholder group owned the company likely impacted the jury's decision as well.<sup>18</sup> Although the plaintiffs were permitted to suggest that State Farm was motivated by greed, the court prohibited State Farm from refuting their suggestion by showing that the policyholders owned the company and benefited from its financial success.<sup>19</sup> In addition, the trial court barred insurance regulators from testifying on behalf of State Farm concerning debates in state legislatures about the quality of non-OEM parts.<sup>20</sup> Reportedly, jurors were also not allowed to hear "any of the evidence about the benefits of auto part competition."<sup>21</sup>

The trial court precluded State Farm's damages expert from testifying.<sup>22</sup> Thus, the plaintiffs' expert, Dr. Iqbal Mathur, offered the only expert testimony jurors heard.<sup>23</sup> Dr. Mathur asserted two theories for measuring damages: a "specification" theory and an "installation" theory.<sup>24</sup> Under the "specification" theory, the insured suffered damages if a non-OEM part was specified on the repair estimate, even if non-OEM parts were not installed on the vehicle. Yet, upon cross-examination, Dr. Mathur conceded that this theory made "no economic sense."<sup>25</sup> Under the "installation" theory, those insureds who had non-OEM parts installed on their vehicles were further entitled to "installation" damages.<sup>26</sup> Dr. Mathur found that damages could be anywhere between \$658,450,000 and \$1,211,500,000, yet he conceded that "his estimate could be too high by as much as \$1 billion."<sup>27</sup>

In its brief requesting the Illinois Supreme Court to bypass the usual appellate process by directly considering the appeal, State Farm expressed concern there would be a significant adverse effect on insurance consumers "if insurance companies stop[ped] specifying non-OEM repair parts."<sup>28</sup> Furthermore, the brief addressed three main issues it alleged would warrant direct review by the Illinois

18. See Memorandum of State Farm Mut. Ins. Co. at 17, *Avery* (No. 88853).

19. See *id.*

20. See *id.*

21. David Reich-Hale, *When Car Costs Less Than Sum of Its Parts, Auto Competition Is Critical, Insurers Contend*, NAT'L UNDERWRITER (PROPERTY & CASUALTY), Jan. 3, 2000, at 3, 3.

22. See Memorandum of State Farm Mut. Ins. Co. at 18, *Avery* (No. 88853).

23. See *id.*

24. See *id.*

25. See *id.* at 18.

26. See *id.* at 19.

27. *Id.*

28. *Id.* at 5.

Supreme Court: (1) the class should not have been certified, (2) the punitive damages award should not have been awarded, and (3) direct review is in the public's best interest.<sup>29</sup> But in denying review, the Illinois Supreme Court simply stated "Motion by appellant for direct appeal to this Court pursuant to Supreme Court Rule 302(b). Motion Denied."<sup>30</sup> This decision was a surprising move by the state supreme court, since the amount of money involved will certainly lead the losing party at the appellate level to file an appeal with the Illinois Supreme Court.

State Farm fears that southern Illinois will become a magnet for similar class action lawsuits.<sup>31</sup> This fear is supported by several similar lawsuits that have already been filed against automobile insurers in the wake of the *Avery* decision. Indeed, the same group of lawyers that represented the *Avery* plaintiffs has filed similar lawsuits against other insurers in the same county where *Avery* was decided.<sup>32</sup>

The first of these, *Paul v. Country Mutual Insurance Co.*,<sup>33</sup> alleged that the insurance companies engaged in a "uniform and common practice of using inferior, imitation crash parts in the repair of their policyholder's vehicle."<sup>34</sup> The second case, *Hobbs v. State Farm Mutual Automobile Insurance Co.*,<sup>35</sup> was filed less than one month after the *Avery* decision. The plaintiffs in *Hobbs* named a number of automobile insurers as defendants including State Farm, CNA, Allstate, Safeco, Liberty Mutual, USAA, and GEICO. These plaintiffs contended that the insurers:

knowingly specified inferior non-OEM crash parts, falsely claimed that these non-OEM crash parts were of like kind and quality, and jointly founded and financed the Certified Auto Parts Association ("CAPA") as a front to conceal their conduct and to deceive policyholders into believing that parts of like kind and quality to OEM parts were being used to satisfy policyholder claims.<sup>36</sup>

The plaintiffs are again seeking class action status.<sup>37</sup> David Snyder, Assistant General Counsel for the American Insurance Association, recently summed up the decision by stating, "the filing of the *Hobbs*

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29. See *id.* 21, 28, 31.

30. *Avery v. State Farm Mut. Auto. Ins. Co.*, No. 88853 (Ill. Feb. 24, 2000).

31. See Memorandum of State Farm Mut. Ins. Co. at 33-34, *Avery* (No. 88853).

32. See *id.* at 7.

33. No. 99-L-995 (Ill. Cir. Ct.). The complaint was filed October 13, 1999.

34. Complaint at 1, *Paul* (No. 99-L-995).

35. No. 99-L-1068 (Ill. Cir. Ct.). The complaint was filed Nov. 2, 1999.

36. Complaint at 1, *Hobbs* (No. 99-L-1068); see also *infra* notes 95-99 and accompanying text for further discussion of CAPA.

37. See Complaint at 8, *Hobbs* (No. 99-L-1068).

lawsuit is evidence that this litigation will have the effect of creating a monopoly in what is now a competitive parts industry.”<sup>38</sup>

The significant impact of the *Avery* decision has extended beyond the borders of the United States and into Canada.<sup>39</sup> As of January 3, 2000, a “class action style lawsuit [had] been filed in Quebec against Group Desjardins, ING Canada (the second largest auto insurer in Canada) and AXA Canada (seventh largest) relating to their use of non-OE[M] parts.”<sup>40</sup> Two American insurance companies that sell automobile insurance in Canada, State Farm and Liberty Mutual, have ceased using non-OEM parts on vehicles repaired in Ontario, Canada.<sup>41</sup> Furthermore, trade associations are petitioning Transport Canada to prohibit the importation of non-OEM parts, some of which come from American companies.<sup>42</sup>

State Farm, Country Companies, and Nationwide have recently ceased repairing wrecked vehicles with non-OEM parts.<sup>43</sup> Nationwide’s decision also extended to its Nationwide affiliates: Allied, Farmland, and Scottsdale Insurance Companies.<sup>44</sup> A Nationwide representative issuing the non-OEM decision said this was made in response to the “current environment surrounding non-OEM crash parts.”<sup>45</sup> As a result, during the first month of the suspension of non-OEM parts, State Farm has incurred costs of \$4.8 million more than expected to repair insured vehicles.<sup>46</sup>

In contrast, several other major insurers including Allstate, Farmers, Progressive, USAA, Travelers, SAFECO and Hartford continue to use non-OEM parts in the wake of *Avery*.<sup>47</sup> According to an Allstate representative, Allstate will continue to use non-OEM parts “where appropriate.”<sup>48</sup> USAA recently reviewed its policy surrounding non-OEM parts, but the company contends that this is not in response to the *Avery* trial or decision.<sup>49</sup>

*Avery* has reached into U.S. financial markets as well. The stock price of Keystone Automotive Industries, Inc., the largest non-OEM

38. Curtis Anderson, *Seven Auto Insurers Named in Illinois Aftermarket Parts Suit*, CLAIMS, Dec. 1999, at 12, 12.

39. See *Aftermarket Parts Lawsuits Hit Canada*, COLLISIONWEEK (Quandec Corp.), Jan. 3, 2000, <http://www.collisionweek.com> (visited Oct. 16, 2000).

40. *Id.*

41. *See id.*

42. *See id.*

43. See *Nationwide Insurance Suspends Use of Non-OEM Crash Parts*, at <http://www.insure.com/auto/collision/nationwide1199.html> (last modified Nov. 5, 1999).

44. *See id.*

45. *Id.*

46. See Memorandum of State Farm Mut. Ins. Co. at 5, *Avery* (No. 88853).

47. See Joe Frey, *Is the State Farm Verdict Enough To Change Industry Practice?*, at <http://www.insure.com/auto/collision/statefarmup10994.html> (visited Mar. 29, 2000).

48. *Id.*

49. *See id.*



parts distributor in the U.S., was \$21.63 in January 1999.<sup>50</sup> That price fell to \$10.88 per share during the course of the trial as investors got cold feet, then dropped to \$8.50 the day following the decision.<sup>51</sup> In October, 2000, the price of Keystone stock bottomed out at \$4.56 per share.<sup>52</sup> As of January 23, 2001, the stock had risen to \$8.00 per share.<sup>53</sup> If this trend continues, many non-OEM parts manufacturers may be driven out of business. If that occurs, consumers will end up in the same situation that they were in during the 1970s, when automobile manufacturers monopolized repair parts.<sup>54</sup>

What plaintiffs' attorneys are hailing as a victory for consumers may ultimately be the sole reason for an increase in automobile insurance rates.<sup>55</sup> In discussing what consumers should expect rates to be in the future, Robert Hurns, an analyst with the National Association of Independent Insurers, recently stated, "[Y]ou will end up paying higher premiums."<sup>56</sup> Insurance companies use non-OEM parts to minimize insurance costs. Their rationale is based on simple economic principles: reduce costs and pass those savings on to consumers.

Other insurance industry analysts believe that if the *Avery* verdict is upheld, there will be little, if any, effect on future insurance rates. One such analyst predicted that insurance policyholders with State Farm would see only a 1% increase in their insurance rates as a result of *Avery*.<sup>57</sup> This assertion is made in part because the appeal may overturn the verdict or will at least delay payment. The assertion also takes into account the time required for the insurance companies to file rate increases with each state insurance department, further delaying the effects of any automobile rate hikes.<sup>58</sup>

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50. See Joseph Ascenzi, *State Farm Auto Parts Dispute Dings Manufacturer*, BUS. PRESS, Oct. 18, 1999, at 2, 1999 WL 7171730.

51. See *id.*

52. See Search of Nasdaq Index Quotes, <http://quotes.nasdaq.com> (select "charting"; enter "KEYS" in ADD A SECURITY FIELD; select appropriate interval; click on chart). Keystone had not suffered any major business setbacks, so it seems likely that the drop was a result of concern after the *Avery* decision. See Joseph Ascenzi, *After-Market Auto Parts To Bear Keystone Brand: Earnings Drop 79% After Court Orders Repair Shops To Use Manufacturer Parts*, BUS. PRESS, Nov. 20, 2000, at 1, 2000 WL 7814823.

53. See Search of Nasdaq Index Quotes, *supra* note 52.

54. See ALLIANCE OF AM. INSURERS, AUTO MANUFACTURERS WANT A MONOPOLY ON REPLACEMENT CAR PARTS (1999) [hereinafter AAI, MONOPOLY].

55. See Matthew L. Wald, *Consumers May Be Losers in a Verdict on Auto Parts*, N.Y. TIMES, Oct. 17, 1999, at C1.

56. *Id.*

57. See Joe Frey, *Higher Auto Premiums Because of State Farm Verdict? Think Again*, at <http://www.insure.com/auto/collision/statefarmup10992.html> (last modified Oct. 6, 1999).

58. See *id.*

Recently the Insurance Information Institute (I.I.I.) released figures that indicate *Avery* has had an effect on the insurance industry.<sup>59</sup> An increase of 1.5% occurred in 2000, which is the first increase in three years.<sup>60</sup> The increase for 2001 is expected to be between 2% and 4%.<sup>61</sup> These figures show a significant change as 1998 and 1999 experienced rate decreases for the first time since 1973.<sup>62</sup> Dr. Robert P. Hartwig, I.I.I. Vice President and Chief Economist, stated that “[t]he effective prohibition on the use of generic parts of like kind and quality in the repair of damaged vehicles [as a result of *Avery*] is a factor that could ultimately add \$4 to \$5 billion annually to the cost of automobile insurance.”<sup>63</sup>

### III. RELATED CASES

The *Avery* decision is a drastic shift in how courts traditionally view the use of non-OEM parts. A survey of cases across the United States shows that cases similar to *Avery* have either been dismissed or have been decided in favor of the insurance-company defendants.

*Arizona*.—An Arizona Superior Court dismissed a similar case after the *Avery* decision. In *Kenger v. Government Employees Insurance Co.*,<sup>64</sup> Judge Norman Davis ruled that Mr. Kenger did not prove that the radiator installed in his Honda was inferior or that he suffered damage.<sup>65</sup>

*Florida*.—A trial court in Florida dismissed a similar case, which the Florida Third District Court of Appeal affirmed in April of 1999.<sup>66</sup> The appellate court stated, “The economic loss rule bars causes of actions in tort between parties to a contract unless there is proof of personal injury or property damage independent of a breach of the contract.”<sup>67</sup> The trial court found no economic loss or breach of contract, prompting the dismissal of the plaintiff’s claim.<sup>68</sup>

*Massachusetts*.—A Superior Court in Norfolk County granted partial summary judgment to the defendant insurance company on a diminished value claim.<sup>69</sup> The court found nothing in the insurance

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59. See Press Release, Insurance Info. Inst., Auto Insurance Rates Expected to Rise, Court Decision and Litigation End Recent Declines, I.I.I. Reports (Dec. 4, 2000), <http://www.iii.org> (visited Jan. 10, 2001).

60. See *id.*

61. See *id.*

62. See *id.*

63. *Id.*

64. No. CV9901522 (Ariz. Super. Ct. Feb. 18, 2000).

65. See *id.*

66. See *Clayton v. State Farm Mut. Auto. Ins. Co.*, 729 So. 2d 1012, 1013 (Fla. 3d DCA 1999).

67. *Id.*

68. See *id.*

69. See *Roth v. Amica Mut. Ins. Co.*, No. 98-3551, slip op. at 3 (Mass. Super. Ct. Sept. 3, 1999).

policy that precluded the use of non-OEM parts. Additionally, in denying a second motion for summary judgment, the court stated, “statutes and regulations in the Commonwealth mandate such usage, no doubt to reduce costs of repair and consequently, premium costs to consumers.”<sup>70</sup> The court denied the insurance company’s summary judgment motion, acknowledging that there was an issue of material fact regarding the quality of the non-OEM fender in question.<sup>71</sup>

*Pennsylvania.*—The Court of Common Pleas of Philadelphia County also sustained an insurance company’s preliminary objection to the plaintiffs’ class action complaint.<sup>72</sup> The insurance company “disput[ed] that any contractual duty was owed to the plaintiff to pay for that automobile’s diminished value.”<sup>73</sup> According to the court, “Pennsylvania follows the reasonable expectation doctrine in determining the scope of an insurance contract.”<sup>74</sup> The court reasoned that plaintiffs’ “expectations are not reasonable in light of the current common practice in Pennsylvania.”<sup>75</sup> Hence, the court dismissed the class action complaint with prejudice.<sup>76</sup>

*Tennessee.*—In *Murray v. State Farm Mutual Insurance Co.*,<sup>77</sup> the United States District Court for the Western District of Tennessee denied the plaintiffs’ motion for class certification.<sup>78</sup> The court cited two reasons. First, common questions of fact and law did not exist.<sup>79</sup> Second, the court stated that there were potential conflicts among the class representatives that might not be resolvable.<sup>80</sup> As a result, State Farm policyholders in Tennessee were not a part of the *Avery* class action suit.<sup>81</sup> The plaintiffs did not appeal the denial of class certification.<sup>82</sup>

*Texas.*—The plaintiffs in *Berry v. State Farm Mutual Automobile Insurance Co.*<sup>83</sup> made essentially the same allegations as the *Avery* plaintiffs. Although the court granted summary judgment in favor of the insurance companies, the insureds had abandoned their breach of

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70. Roth v. Amica Mut. Ins. Co., No. 98-3551, slip. op. at 4 (Mass. Super. Ct. July 31, 2000).

71. See *id.*

72. See Munoz v. Allstate Ins. Co., No. 9906-2855, slip. op. at 1 (Pa. C.P. Ct. Nov. 23, 1999).

73. *Id.* at 2.

74. *Id.* at 3.

75. *Id.* at 4.

76. See *id.* at 6.

77. No. 96-2585 MI/A, slip op. (W.D. Tenn. Aug. 19, 1997).

78. *Id.* at 1.

79. See *id.* at 15 (holding that there could not be common questions of fact because the determination of inferiority of non-OEM parts “would require the testing of thousands of individual crash parts”).

80. See *id.* at 20.

81. See Memorandum of State Farm Mut. Ins. Co. at 12, *Avery* (No. 88853).

82. See *id.*

83. 9 S.W.3d 884 (Tex. App. 2000).

contract claims.<sup>84</sup> Instead, the court decided that the insurance companies were not required “to pay for the new OEM parts in the satisfaction of all legitimate claims.”<sup>85</sup> The court held that “like kind and quality” parts do not necessarily have to be OEM parts.<sup>86</sup> The court stated, “[W]e cannot say as a matter of law that all non-OEM parts are substandard and that insurers must pay for new OEM parts in every claim, regardless of the age or condition of the covered vehicle prior to the accident or the quality of available non-OEM parts.”<sup>87</sup>

#### IV. THE DEBATE: OEM VS. NON-OEM

The trial court’s decision in *Avery* was based on the plaintiffs’ claim that “non-OEM parts are generally inferior to OEM parts” and that “State Farm had breached its ‘promise to the class’” to restore the vehicles to their preloss condition.<sup>88</sup> But the plaintiffs conceded at trial that they “could *not* prove that all non-OEM [parts] were inferior.”<sup>89</sup> In turn, State Farm argued that the plaintiffs’ concession showed that the trial court must determine on a case-by-case basis whether use of non-OEM parts restored each vehicle to its preloss condition.<sup>90</sup> Rejecting this argument, the trial court spawned further debate regarding OEM and non-OEM parts.<sup>91</sup> Hence, it is important to determine whether the OEM parts are actually superior to non-OEM parts before deciding whether the plaintiffs’ arguments in *Avery* are valid. In determining whether one class of parts is superior overall, issues of safety, warranty, price, and competition must be thoroughly examined.

##### A. *Differences Between Non-OEM and OEM Parts*

The key difference between an OEM part and a non-OEM part is the *distributor* of the part. The automobile manufacturer distributes OEM parts. For example, Ford Motor Company distributes OEM Ford parts. A manufacturer other than Ford, such as Keystone Automotive, may distribute the non-OEM parts for Ford vehicles. Most automobile manufacturers do not actually fabricate the OEM parts themselves.<sup>92</sup> Instead, they subcontract with independent

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84. *See id.* at 888.

85. *Id.* at 894.

86. *Id.*

87. *Id.*

88. Memorandum of State Farm Mut. Ins. Co. at 15, *Avery* (No. 88853).

89. *Id.*

90. *See id.*

91. *See id.* at 16.

92. *See* ALLIANCE OF AM. INSURERS, CLAIMS BULLETIN NO. 99-9, SUBJECT: AFTER MARKET PARTS (1999) (on file with author) [hereinafter, AAI, CLAIMS BULLETIN].

manufacturers for the fabrication of OEM parts, affixing “genuine part” labels to them.<sup>93</sup> Some of the same subcontractors that manufacture OEM parts also manufacture non-OEM parts!<sup>94</sup>

Not only is there a distinction, however superficial, *between* OEM and non-OEM parts, there is also a distinction *among* non-OEM parts. The Certified Automotive Parts Association (CAPA) is an independent organization that certifies certain non-OEM parts that meet specified criteria. CAPA was “established in 1987 to develop and oversee a test program guaranteeing the suitability and quality of automotive parts.”<sup>95</sup> The yellow CAPA seal on a non-OEM part signifies that the part is certified to “meet or exceed CAPA Quality Standards for fit, materials, and corrosion resistance.”<sup>96</sup> CAPA’s part certification program includes manufacturer facility approval, individual part certification, and random inspections of both facilities and parts to ensure part quality.<sup>97</sup> Since 1992, CAPA has used the same laboratories as car manufacturers use to test their parts in order to prove that CAPA-certified parts are of the same quality as OEM parts.<sup>98</sup> CAPA-certified parts account for only 3% of the crash-parts sold today while their market share is steadily growing.<sup>99</sup>

### B. Safety

Most OEM proponents have taken the position that non-OEM parts compromise vehicle safety.<sup>100</sup> However, two separate studies by the Insurance Institute for Highway Safety (IIHS) found that non-OEM parts do not affect vehicle safety.<sup>101</sup> During one study, IIHS stripped a 1997 Toyota Camry of its cosmetic parts (fenders, door skins, and front bumper) and installed a certified non-OEM hood.<sup>102</sup> IIHS then performed a forty mile per hour frontal impact crash test, which yielded positive results.<sup>103</sup> Thus, IIHS concluded that a Camry without the installation of cosmetic parts was as crashworthy as a

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93. *See id.*

94. *See id.*

95. *Certified Automotive Parts Association* (Homepage), at <http://www.capacertified.com> (visited Oct. 16, 2000).

96. *CAPA Overview*, at <http://www.capacertified.com/about.html> (visited Mar. 5, 2001).

97. *See id.*

98. *See* AAI, *MONOPOLY*, *supra* note 54.

99. *See Cheap Car Parts Can Cost You a Bundle*, CONSUMER REPORTS, Feb. 1999, at 15 [hereinafter *Cheap Car Parts*].

100. *See id.* at 2.

101. *See* INSURANCE INST. FOR HIGHWAY SAFETY, STATUS REPORT: COSMETIC REPAIR PARTS IRRELEVANT TO SAFETY, 1-6 (2000), available at <http://www.highwaysafety.org/sr.htm> (last modified Jan. 5, 2001).

102. *See id.*

103. *See id.*

fully equipped Camry with OEM parts.<sup>104</sup> An industry spokesperson reassured that “[t]he cosmetic parts didn’t influence the results.”<sup>105</sup>

In the other study, which was performed several years earlier, IIHS performed a thirty mile per hour front-into-barrier crash test on a 1987 Ford Escort equipped with a competitive replacement hood.<sup>106</sup> The crash-tested car “met and far exceeded all federal requirements.”<sup>107</sup> Specialists at IIHS stated that because the car withstood the crash without the installation of cosmetic parts, the parts were “irrelevant to meeting federal safety requirements.”<sup>108</sup>

### C. Warranty Issues

Some opponents of non-OEM parts also argue that the use of non-OEM parts to repair a vehicle voids the manufacturer’s original warranty.<sup>109</sup> This claim is without merit as the federal Magnuson-Moss Warrant Act<sup>110</sup> ensures that the use of non-OEM parts generally does not void the warranty on the remaining parts.<sup>111</sup> When considering the Magnuson-Moss Act, legislators specifically addressed automobile parts. House Report 93-1107 states, “Under this prohibition . . . no automobile manufacturer may condition his warranty of an automobile . . . on the use of its own automobile parts unless he shows that any other . . . automobile parts which are available . . . will not give equivalent performance characteristics in the automobile.”<sup>112</sup> Consumers are further protected because most insurance companies offer lifetime warranties for non-OEM parts used to repair their vehicles. For example, State Farm and GEICO guarantee non-OEM parts for as long as the insured owns the vehicle.<sup>113</sup>

The above discussion suggests that the answer to the debate regarding whether to use OEM or non-OEM parts is to use both. In other words, insurers should be allowed to continue using non-OEM parts to repair damaged automobiles. Consumers apparently reached the same conclusion on their own. Because Indiana law requires consent to use non-OEM parts in repairing vehicles, State Farm

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104. *See id.*

105. *Id.* at 2.

106. *See id.* at 4.

107. Alliance of Am. Insurers, Test Shows Cosmetic Parts Do Not Affect Safety Compliance (1999) (promotional material, on file with author).

108. *Id.*

109. *See* AAI, MONOPOLY, *supra* note 54.

110. *See* 15 U.S.C. § 2302(c) (1994); *see also* AAI, MONOPOLY, *supra* note 54.

111. *See* AAI, MONOPOLY, *supra* note 54.

112. H.R. Rep. No. 93-1107, at 36, 37 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 7719.

113. *See What Is an Aftermarket Part?*, at <http://www.geico.com/infocenter/faqframeset.htm> (visited Mar. 27, 2000).

conducted a study which found that 93.2% of policyholders consented to using non-OEM parts on their vehicles.<sup>114</sup> Additionally, in a survey of 1400 State Farm claim files involving estimates with non-OEM parts, only .59% of policyholders complained.<sup>115</sup> Such figures suggest that both consumers and insurance companies recognize the benefits of non-OEM parts.

#### *D. Price*

##### *1. Parts*

Whether CAPA-approved or not, non-OEM parts are significantly less expensive than OEM parts. The Alliance for American Insurers (AAI) concluded that OEM parts are on average 60% more expensive than their certified non-OEM counterparts.<sup>116</sup> Appendix A illustrates the difference between the prices of OEM parts and non-OEM parts for several makes of automobiles.<sup>117</sup>

According to Appendix A, OEM parts are consistently more expensive than similar non-OEM parts. In a few instances, the price of an OEM part is three times that of a non-OEM part.<sup>118</sup> Appendix A shows that the average cost of an OEM bumper was 43.6% higher than a non-OEM bumper. The OEM hoods were 63.5% more costly than non-OEM hoods, and the OEM fenders were 88.3% more expensive than their non-OEM counterparts. These types of increased part costs caused State Farm some \$4.8 million in losses in the month following *Avery*.<sup>119</sup> If this trend of using only OEM parts continues, the heightened cost “will inevitably be passed on to consumers in the form of higher insurance premiums.”<sup>120</sup>

If Appendix A were to compare the total cost of a vehicle in relation to each individual part, the cost gap would further widen. An AAI study found that purchasing each of the OEM parts required to assemble a 1999 Toyota Camry would cost over \$101,355.<sup>121</sup> This figure does not include the cost of assembling the parts or painting the car.<sup>122</sup> When considering that the retail price of this car is only

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114. See *State Farm Indiana Policyholders Choose Non-OEM Crash Parts*, at <http://www.statefarm.com/insuranc/auto/trialpc.htm> (visited Oct. 16, 2000).

115. See *Policyholder Complaint Rates with Repairs Involving Non-OEM Crash Parts*, at <http://www.statefarm.com/insuranc/auto/trialpcr.htm> (visited Oct. 16, 2000).

116. See AAI, CLAIMS BULLETIN, *supra* note 92.

117. See *infra* App. A.

118. Note the differences in price between the Chrysler Cirrus and Honda Accord fenders and non-OEM fenders.

119. See Memorandum of State Farm Mut. Ins. Co. at 5, *Avery* (No. 88853).

120. *Id.*

121. See AAI, Rebuilt Camry, *supra* note 1.

122. See *id.*

\$23,263,<sup>123</sup> one may easily conclude that OEM parts are extremely overpriced.

Insurance companies use non-OEM parts for several reasons. The most important reason, however, is that non-OEM parts keep costs down, which in turn keeps insurance premiums down.<sup>124</sup> State Farm, a mutual insurance company owned by its policyholders, has traditionally passed these savings along to its customers in the form of reimbursements.<sup>125</sup> It is estimated “that insurance companies are able to reduce repair costs by approximately \$800 million a year by specifying less expensive non-OEM parts.”<sup>126</sup> Although the judge in *Avery* did not admit these estimated savings figures as evidence, State Farm was prepared to show the jury that during the period of 1987 to 1997, it was able to save its policyholders millions of dollars as a result of non-OEM parts use.<sup>127</sup> Here are the figures:

YEAR	MILLIONS OF DOLLARS SAVED BY THE USE OF NON-OEM PARTS <sup>128</sup>
1987	\$54.7
1988	\$65.2
1989	\$77.5
1990	\$90.3
1991	\$107.9
1992	\$139.3
1993	\$150.3
1994	\$190.1
1995	\$206.1
1996	\$226.8
1997	\$233.6

Such savings can only help to foster stabilization of automobile repair costs and insurance rates.<sup>129</sup> There is currently only one known insurance company, the Interinsurance Exchange of the

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123. *See id.*

124. *See* E-mail from Bernadette Baltakis, Internet Rep., Progressive Casualty Ins. Co., to Matthew Rearden (Feb. 9, 2000) (on file with author) (“The availability of quality non-OEM parts encourages competition among parts manufacturers and suppliers and drives down the cost of auto repairs. When competition is eliminated, prices rise.”).

125. *See* Memorandum of State Farm Mut. Ins. Co. at 17, *Avery* (No. 88853).

126. *Id.* at 5.

127. *See* *Premiums Saved by State Farm Mutual Policyholders as a Result of the Introduction of Competitively Priced Auto Crash Parts*, at <http://www.statefarm.com/insuranc/auto/trialps.htm> (visited Mar. 31, 2000).

128. *See id.*

129. *See* Press Release, National Ass’n of Indep. Insurers, Class Action Lawsuit Battle over Replacement Parts Expands According to the National Association of Independent Insurers (Nov. 3, 1999) (on file with author).



Automobile Club of Southern California, that uses only OEM parts to repair its insureds' vehicles.<sup>130</sup> Prior to the *Avery* decision, at least five other insurance companies (Allstate, Erie, Farmers, State Farm, and USAA) recommended, but did not require, the use of non-OEM parts.<sup>131</sup>

## 2. Installation

On the other hand, non-OEM parts may require more installation time than their OEM counterparts. A recent study by Frost & Sullivan, an independent marketing firm, found that 89% of repair shops responded that "it takes about two hours longer to install an imitation part, costing \$60 to \$90 extra in labor."<sup>132</sup> Improper fit of the non-OEM parts may cause the longer installation times. At a recent demonstration at the Collision Industry Conference (CIC), "a CAPA hood and fender . . . didn't fit properly on an undamaged 1994 Toyota Camry . . . ."<sup>133</sup> CAPA decertified the fender just days before the conference and decertified the hood on the spot.<sup>134</sup> However, three months later at another CIC demonstration all of the CAPA and non-CAPA parts fit correctly.<sup>135</sup> At any rate, to the extent that non-OEM parts require longer installation, this extra cost would offset some of the savings from the lower cost of the parts.

## E. Competition

One must also weigh the costs of non-OEM installation delay against the market benefits. Prior to the mid-1970s, automobile manufacturers monopolized the replacement parts market.<sup>136</sup> Before the introduction of non-OEM parts, automobile companies enjoyed up to an 800% mark-up on OEM parts sales.<sup>137</sup> "Henry Ford is reputed to have said he'd give his cars away if he could have a monopoly on selling replacement parts."<sup>138</sup> Indeed, OEM prices decreased after non-OEM parts introduced competition into the market.<sup>139</sup> Appendix

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130. See *Cheap Car Parts*, *supra* note 99, at 19.

131. See *id.* at 18-19.

132. *Id.* at 17.

133. *Id.* at 16.

134. See *id.*

135. See *id.* at 16-17.

136. See AAI, MONOPOLY, *supra* note 54.

137. See ALLIANCE OF AM. INSURERS, COMPARISON OF CURRENT COSTS: OEM V. COMPETITIVE REPLACEMENT PARTS (1999) [hereinafter AAI, CURRENT COSTS] (on file with author).

138. *Id.* at 16.

139. See ALLIANCE OF AM. INSURERS, COST HISTORY COMPARISON: OEM V. COMPETITIVE REPLACEMENT PARTS (1999) [hereinafter AAI, COST HISTORY] (on file with author).

B numerically demonstrates how non-OEM parts competition has driven down the cost of OEM parts.<sup>140</sup>

In addition, non-OEM parts ensure better products and prices through competition. Most advocates of these parts assert that “allowing competition in the production of crash parts actually helps ensure quality and safety. Competition forces each individual company to produce quality parts at a fair market price.”<sup>141</sup> Thus, not only does using non-OEM parts offer short-term cost savings over OEM parts but, by supporting the market in non-OEM parts it keeps down OEM prices, too.

#### V. SOLUTION: GIVE CONSUMERS A CHOICE

How might insurers craft policies to allow use of both OEM parts and non-OEM parts—without subjecting themselves to expensive litigation? The answer is the development of a two-tiered approach to insurance policies in an area where, traditionally, “there has not been much of an appetite.”<sup>142</sup> To avoid future lawsuits like *Avery*, insurance companies offering policies in Florida (and elsewhere) should offer two types of insurance policies—a “standard” policy and an “OEM” policy.<sup>143</sup> Should the insurance companies decline to offer the two types of policies, the Florida Legislature should explore whether to enact legislation requiring Florida automobile insurance companies to offer consumers a choice.

140. See *infra* App. B.

141. STEVEN J. SINKULA, CITIZENS FOR A SOUND ECONOMY FOUNDATION, CRASH REPLACEMENT PARTS: AFTER-MARKET OR NO MARKET? (Capitol Comment No. 199, 1998).

142. David Reich-Hale, *State Farm Case Spurs Auto Policy Questions*, NAT’L UNDERWRITER (PROPERTY & CASUALTY), Jan. 10, 2000, at 18 (quoting Todd Muller, Assoc. V.P., Consumer Affs. for the Indep. Ins. Agents of America).

143. Bob Crawford, the Florida Commissioner of Agriculture and Consumer Services, recently stated that the *Avery* decision, along with a *Consumer Reports* article, was a key factor in a “crackdown on inferior auto crash parts.” Press Release, Florida Dep’t of Agric. and Consumer Servs., Crawford Launches Crackdown on Inferior Auto Crash Parts (Apr. 14, 2000), <http://doacs.state.fl.us/press/04142000.html> (visited Oct. 7, 2000) [hereinafter DOACS, Crawford Crackdown]. The Florida Department of Agriculture and Consumer Services, which regulates Florida automobile repair shops, sent a notice to these shops requiring that they “maintain documentation whenever an after-market crash part is installed on a vehicle.” *Id.* While this practice is consistent with Florida law relating to the use of non-OEM parts, some insurance industry personnel are concerned with the general tone of the Commissioner’s statement. See E-mail from Kirk Hansen, Director of Claims, Alliance of Am. Insurers, to Matthew Rearden (Apr. 17, 2000) (on file with author). Any attempt by insurance companies to force repair shops to use non-OEM parts will now trigger an investigation by the Department of Agriculture and Consumer Services and a referral to the Florida Department of Insurance. See DOACS, Crawford Crackdown, *supra*. The bottom line is that Commissioner Crawford wants consumers to receive parts that are equal to OEM parts in terms of quality, fit, and performance. See E-mail from Terry McElroy, Florida Dep’t of Agric. and Consumer Servs., to Matthew Rearden (Apr. 17, 2000) (on file with author). This may simply be the starting point for a flood of similar regulations or “crackdowns” across the country which stem directly from *Avery*.

The “standard” automobile policy would essentially be the same as the typical policy in existence today. But some wording changes may be advisable in the wake of *Avery*, such as altering the “pre-loss condition” guarantee language, which was the crux of the *Avery* plaintiffs’ argument.<sup>144</sup> For example, insurance companies may promise to *strive for* preloss condition, but not go so far as to provide an absolute guarantee. Another option is to borrow CAPA’s language and promise to provide “functionally equivalent” parts.<sup>145</sup> Consumer advocacy groups are likely to oppose these changes. Nevertheless, *Avery* has left insurance companies with few options.

Insurance companies should, however, also offer consumers an opportunity to purchase an “OEM” policy, at additional cost, which would consist of the “standard” policy plus an endorsement. This endorsement would state that the estimate and repair would consist of *only* OEM parts. The cost would be calculated on the fact that collision repair costs constitute roughly 38-50% of the cost of an insured’s automobile insurance policy premium.<sup>146</sup> While actuaries would determine the exact amount each OEM policy would cost, the following is an example of how the new pricing could be developed.

The analysis begins with current insurance rates. On February 9, 2000, three insurance companies in Florida provided quotes for an insurance policy for a forty-year-old male with a good driving record.<sup>147</sup> The quotes were based on a 100/300/100 policy<sup>148</sup> with \$500 deductibles for comprehensive and collision coverage. The companies offered rates for the 1999 Ford Taurus LX, 1998 Dodge Grand Caravan ES, and the 1997 Honda Accord LX, which were chosen because of their price diversity, commonality of usage, and different manufacturers.

#### Automobile Insurance Premiums<sup>149</sup>

	1999 Ford Taurus LX	1998 Dodge Grand Caravan	1997 Honda Accord LX
State Farm	\$391.48	\$398.56	\$382.72

144. See Memorandum of State Farm Mut. Ins. Co. at 15, *Avery* (No. 88853).

145. *Functionally Equivalent? LKQ? Similar? Equal?*, CAPA NEWS, June 1999, at 5, available at <http://www.capacertified.org> (visited Jan. 15, 2001).

146. See Reich-Hale, *supra* note 21, at 16 (estimating 40-50%); Wald *supra* note 55, at C1 (estimating 38%).

147. See Telephone Interview with Cindy Ferarra, Office of State Farm Ins. Agent Jose Castillion, Daytona Beach, Fla. (Feb. 9, 2000); Telephone Interview with GEICO Ins. Co. Rep., GEICO 800 Call Center (Feb. 9, 2000); Telephone Interview with Progressive Ins. Co. Rep., Progressive 800 Call Center (Feb. 9, 2000).

148. Such a policy includes \$100,000 of bodily injury coverage per person, \$300,000 aggregate bodily injury coverage per accident, and \$100,000 property damage coverage.

149. See sources cited *supra* note 147.

Progressive	\$394.00	\$434.00	\$436.00
GEICO	\$387.20	\$428.40	\$438.30
Average Premium Per six months	\$390.89	\$420.32	\$419.00

For demonstration purposes, assume that 44% of the insurance premiums are allocated for repairs.<sup>150</sup> The OEM premium can then be established with this five-step formula:<sup>151</sup>

#### POLICY PRICING FORMULA

“Standard” Policy Cost \* Percent Attributable to Repair Damage  
(44%) =      **Standard Premium Attributable to Damage**

“Standard” Policy Cost \* Percent Not Attributable to Repair Damage  
(56%) =      **Standard Premium Not Attributable to Damage**

100 \* (Total OEM Parts Cost - Total Non-OEM Parts Cost)/Total  
OEM Parts Cost =      **Average Percentage Difference**

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150. This estimation is based on policy costs which allocate, on average, 38-50% to cover damage repairs, as discussed earlier. *See* Reich-Hale, *supra* note 21 (estimating 40-50%); Wald, *supra* note 55 (estimating 38%). This percentage will vary based on the portion of each insurance company’s policy that is dedicated to repairing vehicles.

151. If this formula were actually used, the cost difference between all parts (OEM less non-OEM) would have to be accounted for on each vehicle make. For the sake of simplifying explanation, only three major parts were used to calculate the average price difference between OEM and non-OEM parts.

$(100\% + \text{Average Percentage Difference}) * \text{Standard Premium}$   
 $\text{Attributable to Repair Damage} = \text{OEM Premium Attributable to}$   
**Damage**

$\text{OEM Premium Attributable to Damage} + \text{Standard Premium Not}$   
 $\text{Attributable to Repair Damage} = \text{OEM Policy Cost}$

**1999 Ford Taurus LX**

$\$390.89 * 56\% = \$218.90$  (portion of standard policy not attributable to damage)

$\$390.89 * 44\% = \$171.99$  (portion of standard policy attributable to damage)

**OEM VS. NON-OEM PART COST DIFFERENCES<sup>152</sup>**

	OEM Part	Non-OEM Part	Price Difference
Bumper	\$237.60	\$190.00	\$47.60
Hood	\$268.67	\$159.00	\$110.67
Fender	\$136.29	\$90.00	\$46.29
Total	\$642.56	\$438.00	\$204.56

Based on the above chart, Ford OEM parts are 31.8% (\$204.56/\$642.56) more expensive than non-OEM parts.

$$\begin{array}{rclcl}
 1.318 & * & \$171.99 & = & \$226.68 \\
 \text{(increased OEM cost)} & & \text{(amount attributable to damage)} & & \text{(OEM premium attributable to damage)}
 \end{array}$$

$$\begin{array}{rclcl}
 \$226.68 & + & \$218.90 & = & \$445.58 \\
 \text{(OEM premium attributable to damage)} & & \text{(amount of premium not attributable to damage)} & & \text{(OEM premium)}
 \end{array}$$

The estimated cost of an OEM policy for a 1999 Ford Taurus LX would be \$54.69 (\$445.58 - \$390.89) more than a standard policy for a six-month period. Annually, insureds defined in this example would pay an additional \$109.38 for an OEM policy.

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152. See AAI, CURRENT COSTS, *supra* note 137.

### 1998 Dodge Grand Caravan ES

$\$420.32 * 56\% = \$235.38$  (portion of standard policy not attributable to damage)

$\$420.32 * 44\% = \$184.94$  (portion of standard policy attributable to damage)

#### OEM VS. NON-OEM PART COST DIFFERENCES<sup>153</sup>

	OEM Part	Non-OEM Part	Price Difference
Bumper	\$345.00	\$256.00	\$89.00
Hood	\$295.00	\$168.00	\$127.00
Fender	\$132.00	\$91.00	\$41.00
Total	\$772.00	\$515.00	\$257.00

Based on the above chart, Dodge OEM parts are 33.3% (\$257.00/\$772.00) more expensive than non-OEM parts.

$$\begin{array}{rcl}
 1.333 & * & \$184.94 \\
 \text{(increased OEM cost)} & & \text{(amount attributable to damage)} \\
 & & = \$246.53 \\
 & & \text{(OEM premium attributable to damage)}
 \end{array}$$

$$\begin{array}{rcl}
 \$246.53 & + & \$235.38 \\
 \text{(OEM premium attributable to damage)} & & \text{(amount of premium not attributable to damage)} \\
 & & = \$481.91 \\
 & & \text{(OEM premium)}
 \end{array}$$

The estimated cost of an OEM policy for a 1998 Dodge Grand Caravan ES would be \$61.59 (\$481.91 - \$420.32) more than a standard policy.

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153. See *id.*

**1997 Honda Accord LX**

$\$419.00 * 56\% = \$234.64$  (portion of standard policy not attributable to damage)

$\$419.00 * 44\% = \$184.36$  (portion of standard policy attributable to damage)

**OEM vs. Non-OEM Part Cost Differences<sup>154</sup>**

	OEM Part	Non-OEM Part	Price Difference
Bumper	\$188.07	\$132.00	\$56.07
Hood	\$332.47	\$124.00	\$208.47
Fender	\$163.54	\$52.00	\$111.54
Total	\$684.08	\$308.00	\$376.08

Based on the above chart, Honda OEM parts are 55% (\$376.08/\$684.08) more expensive than non-OEM parts.

$$\begin{array}{rcl}
 1.55 & * & \$184.36 & = & \$285.76 \\
 \text{(increased OEM cost)} & & \text{(amount attributable to damage)} & & \text{(OEM premium attributable to damage)}
 \end{array}$$

$$\begin{array}{rcl}
 \$285.76 & + & \$234.64 & = & \$520.40 \\
 \text{(OEM premium attributable to damage)} & & \text{(amount of premium not attributable to damage)} & & \text{(OEM premium)}
 \end{array}$$

The estimated cost of an OEM policy for a 1997 Honda Accord LX would be \$101.40 (\$520.40 - \$419.00) more than a standard policy.

As the above examples illustrate, the “standard” policy in Florida would generally be less expensive than the “OEM” policy.<sup>155</sup> Of course, this analysis is cursory and any pricing change or additional

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154. *See id.*

155. For a chart showing the difference in policy prices, see *infra* app. C.



policy type would have to be developed by insurance actuaries. Their calculations would have to account for predicted automobile accidents, estimated repair costs for the upcoming year, and the possibility that a monopoly of OEM parts in the repair market could trigger increased parts costs. This last factor is especially important due to favorable pricing on non-OEM parts, as shown in Appendix B, "Cost History Comparison: OEM vs. Competitive Replacement Parts."<sup>156</sup> Nonetheless, the above analysis illustrates the lower costs associated with "standard" policies.

The limited analysis shows a range of savings between \$54.69 and \$101.40 per six months for purchasing the "standard" policy. If this analysis were expanded to include parts prices for an entire vehicle, the increase in an "OEM" policy price would continue to grow. Since non-OEM parts are not made for each component of the vehicles, some OEM parts must be used to reconstruct any car. Based on the recent study by the AAI, the OEM parts cost, on average, is 60% greater than the non-OEM parts cost.<sup>157</sup> In referring to this two-policy system, one consumer aptly stated, "Those who want the best should be willing to pay for the best and the rest of us should not have to subsidize them."<sup>158</sup>

As previously mentioned, a two-policy system would require insurance companies, financial analysts, and actuaries to complete a more detailed formulation of the "OEM" policies. Each vehicle make and model should be scrutinized to find the cost difference between repairing it with OEM or non-OEM parts. When this is completed, a formula, similar to the one above, would be applied to find the cost of "OEM" policies. While this tabulation may cost a significant amount of money in research and development, it should be cost effective for both insurance companies and insurance consumers in the long run.<sup>159</sup>

Additionally, insurance companies and automobile repair shops would have to ensure that the parts used are in conformity with the various state regulations regarding the use of non-OEM parts.<sup>160</sup> Many of the fifty states currently have some laws concerning the use of non-OEM parts.<sup>161</sup> These laws may require a written estimate

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156. *Infra* app. B.

157. See AAI, COST HISTORY, *supra* note 139; *infra* app. B.

158. Letter from W. Paul Mandt, to *Nat'l Underwriter* (Nov. 29, 1999), at [http://www.nunews.com/archives/pc\\_archive/1999/p11-29/48letters.asp](http://www.nunews.com/archives/pc_archive/1999/p11-29/48letters.asp) (visited Oct. 16, 2000).

159. See Memorandum of State Farm Mut. Ins. Co. at 5, *Avery* (No. 88853).

160. See ALLIANCE OF AM. INSURERS, STATE LAW GOVERNING AFTERMARKET PARTS (1999) (on file with author); Reich-Hale, *supra* note 21, at 18.

161. See ALA. CODE § 32-17A-1 to -3 (2000); ARIZ. REV. STAT. § 20-461 (2000); ARK. CODE ANN. §§ 4-90-301, -302, -307 (Michie 1999); CAL. BUS. & PROF. CODE § 9875.1 (West 2000); COLO. REV. STAT. §§ 10-3-1301 to -1305 (1999); CONN. GEN. STAT. § 38a-355 (2000);

disclosure statement regarding non-OEM parts, written consent by the insured for use of non-OEM parts, warranty of non-OEM parts by the insurance company, or a limitation on the type of parts used. For example, Florida law requires disclosure in all instances where non-OEM parts are used in preparing an estimate for repairs.<sup>162</sup>

While those statutory requirements would remain even with the development of an “OEM” policy, the issuance of an “OEM” policy would eliminate some of the disclosures that must be made with non-OEM parts. In some instances, the mandatory use of non-OEM parts in insurance companies’ “standard” policies could conflict with those statutory requirements. That possibility should be explored before implementation.

The sale and distribution of these two policies must also be explored. Insurance agents would have to adjust to the “OEM” alternative. However, what some may view as a potential pitfall could be a marketing department’s dream. The first few companies to implement the two-policy system would give their agents an opportunity to tap into a market of consumers who want only premium parts for their vehicles.

There is, nonetheless, a very real possibility that the two-policy system would be rejected by insurance consumers. Most consumers generally want to pay the least amount of money for the best product or service. In the insurance world, this translates into the insurance consumer who desires to pay a low insurance rate and expects his vehicle to be repaired with what he conceives as the best repair parts—OEM parts. The potential pitfall lies in the unlikely

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FLA. STAT. § 501.33 (2000); GA. CODE ANN. § 33-6-5 (2000); HAW. REV. STAT. §§ 437B-1, -13, -15 (1999); IDAHO CODE §§ 41-1328B to -1328D (2000); 215 ILL. COMP. STAT. 5/155.29 (West 2000); IND. CODE. § 27-4-1.5-8 (2000); IOWA CODE §§ 507B.4, 321.1 (1999); KAN. STAT. ANN. §§ 50-660, -662 (1999); LA. REV. STAT. ANN. § 51:2424 (West 1999); MD. CODE ANN., COM. LAW § 14-2302 (1999); MASS. GEN. LAWS, ch. 90, § 34R (2000); MICH. COMP. LAWS § 257.1362 (2000); MINN. STAT. §§ 72A.201, 72B.091 (2000); MISS. CODE ANN. § 63-27-1, -3, -5 (1999); MO. REV. STAT. § 407.295 (1999); NEB. ADMIN. CODE tit. 210, §§ 45-002, -006 (2000); N.H. REV. STAT. ANN. § 407-D:2 (1999); N.J. ADMIN. CODE, tit. 11, § 11:2-17.3 (2000); N.Y. COMP. CODES R. & REGS. tit. 11, § 216.7 (2000); N.C. ADMIN. CODE tit. 11, r. 4.0425-.0427 (July 2000); OHIO REV. CODE ANN. § 1345.81 (West 2000); OKLA. STAT. tit. 15, § 955 (1999); OR. REV. STAT. § 746.292 (1999); R.I. GEN. LAWS § 27-10.2-1, -2 (1999); S.D. CODIFIED LAWS § 58-33-71 (Michie 2000); TENN. COMP. R. & REGS. tit. 0780, ch. 1-59-.04 (2000); TEX. INS. CODE ANN. § 5.07-1 (West 1999); UTAH CODE ANN. § 31A-22-319 (2000); VA. CODE ANN. § 38.2-510 (Michie 2000); W. VA. CODE § 46A-6B-1 to -6 (2000); WIS. STAT. § 632.38 (2000); WYO. ADMIN. R. & REGS. ch. 19, § 7 (2000).

162. See FLA. STAT. § 501.33 (2000). The disclosure must contain the following information in a font type no smaller than 10 point:

This estimate has been prepared based on the use of crash parts supplied by a source other than the manufacturer of your motor vehicle. The aftermarket crash parts used in the preparation of this estimate are warranted by the manufacturer or distributor of such parts rather than the manufacturer of your vehicle.

*Id.*

possibility that all consumers would reject the “OEM” policy because of its increased price. If so, the resources expended in developing this policy would be spent in vain. However, the companies with these two-policy systems would avoid lawsuits like *Avery* because of the upfront choice. The first company to institute this type of system would need to take this financial risk.

Experimenting with the two policy types on several of the most popular vehicles would possibly reduce this risk. Moreover, this fear could be minimized simply by observing consumer trends. Certain people only purchase “name brand” products, while others opt for generic items. Furthermore, consumers who prefer premium parts will pay for them, and others will select the “standard” policy.

Once all the bugs are worked out, this two-policy system would benefit both the insurers and the insureds. First, offering two policies will avoid claims like those in *Avery*. Insurance companies will be able to defend such suits on the basis that the insureds agreed to have non-OEM parts installed on their cars when they chose the “standard” policy. For this defense to be asserted, it will nevertheless be necessary to change the language in the policies from guaranteeing “like kind and quality” parts to language which will better reflect the policy the insured chose.<sup>163</sup> Finally, John Rollins, an actuary at Florida Farm Bureau Insurance, succinctly summed up the ramifications of *Avery* when he stated “it is clear that one side benefit of all of this is that it will provide incentive for companies to reexamine [the] products they provide and the consumer friendliness of the products.”<sup>164</sup>

## VI. CONCLUSION

Even if overturned, *Avery* has changed the face of automobile insurance.<sup>165</sup> On the one hand, *Avery* will cause insurance companies to reevaluate their use of non-OEM parts. On the other hand, *Avery* may cause a substantial increase in insurance premiums to offset the cost of more expensive OEM parts. Whether on the initiative of insurance companies or the Florida Legislature, the use of two types of policies may be the answer to the huge question facing the automobile insurance industry—What do we do in the wake of *Avery*?—as well as a long-term win-win solution for consumers. Consumers who are willing to have their automobiles repaired with non-OEM parts can continue to enjoy lower premiums while those

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163. *Avery v. State Farm Auto. Ins. Co.*, No. 97-L-114, 1999 WL 1022134, at \*2 (Ill. Cir. Ct. Oct. 8, 1999), *appeal docketed*, No. 5-99-0830 (Ill. App. Ct. Dec. 21, 1999).

164. Reich-Hale, *supra* note 142, at 18.

165. *See id.*

who are willing to pay higher insurance rates can ensure their automobiles are repaired with OEM parts.

## APPENDIX A

Comparison of Current Costs:  
OEM vs. Competitive Replacement Parts<sup>166</sup>

Make Model	Model Years	Bumper (\$)		Hood (\$)		Fender (\$)	
		OEM	Non- OEM	OEM	Non- OEM	OEM	Non- OEM
<b>Chevrolet Cavalier</b>	<b>1995-99</b>	<b>198.00</b>	<b>137.00</b>	<b>338.00</b>	<b>196.00</b>	<b>146.00</b>	<b>87.00</b>
Chevrolet Lumina	1995-99	302.00	209.00	545.00	279.00	272.00	148.00
<b>Chrysler Cirrus</b>	<b>1995-98</b>	<b>535.00</b>	<b>247.00</b>	<b>295.00</b>	<b>159.00</b>	<b>305.00</b>	<b>95.00</b>
Dodge Caravan	1996-98	345.00	256.00	295.00	168.00	132.00	91.00
<b>Ford Mustang</b>	<b>1994-98</b>	<b>364.10</b>	<b>290.00</b>	<b>529.28</b>	<b>326.00</b>	<b>245.16</b>	<b>117.00</b>
Ford Escort	1997-99	250.22	140.00	143.85	97.00	129.30	50.00
<b>Ford Taurus</b>	<b>1996-99</b>	<b>237.60</b>	<b>190.00</b>	<b>268.67</b>	<b>159.00</b>	<b>136.29</b>	<b>90.00</b>
Honda Accord	1996-97	188.07	132.00	332.47	124.00	163.54	52.00
<b>Mazda 626</b>	<b>1993-95</b>	<b>265.75</b>	<b>180.00</b>	<b>476.50</b>	<b>180.00</b>	<b>138.45</b>	<b>96.00</b>
Nissan Altima	1994-97	145.40	116.00	345.62	153.00	183.29	83.00
<b>Toyota Camry</b>	<b>1997-99</b>	<b>159.52</b>	<b>121.00</b>	<b>282.48</b>	<b>252.00</b>	<b>194.84</b>	<b>189.00</b>
Chevrolet 1500 PU	1988-99	202.38	159.00	299.00	128.00	149.00	77.00
<b>Ford F150 PU</b>	<b>1997-98</b>	<b>235.12</b>	<b>190.00</b>	<b>416.66</b>	<b>260.00</b>	<b>160.02</b>	<b>105.00</b>
Ford Explorer	1995-97	371.58	291.00	350.00	144.00	192.00	79.00

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166. See AAI, CURRENT COSTS, *supra* note 137.

## APPENDIX B

Cost History Comparison:  
OEM vs. Competitive Replacement Parts<sup>167</sup>

<b>Make Model</b>	<b>Model Year</b>	1994	1995	1996	1997	1998	1999
<b>Pontiac Grand Prix Coupe</b>	<b>1991-96</b>						
<b>OEM Fender</b>		<b>309.00</b>	<b>324.00</b>	<b>354.00</b>	<b>364.00</b>	<b>368.00</b>	<b>275.00</b>
Non-OEM Fender		171.00	171.00	131.00	124.00	132.00	132.00
<b>Toyota Camry</b>	<b>1989-95</b>						
<b>OEM Fender</b>		<b>265.79</b>	<b>259.96</b>	<b>143.88</b>	<b>143.88</b>	<b>143.88</b>	<b>146.47</b>
Non-OEM Fender		209.00	104.00	60.00	63.00	77.00	56.00
<b>Chevrolet Caprice</b>	<b>1991-96</b>						
<b>OEM Fender</b>		<b>267.00</b>	<b>226.00</b>	<b>238.00</b>	<b>248.00</b>	<b>248.00</b>	<b>248.00</b>
Non-OEM Fender		186.00	148.00	153.00	140.00	120.00	102.00
<b>Ford Thunderbird</b>	<b>1989-95</b>						
<b>OEM Fender</b>		<b>205.00</b>	<b>211.15</b>	<b>211.00</b>	<b>211.15</b>	<b>222.76</b>	<b>199.20</b>
Non-OEM Fender		166.00	166.00	166.00	166.00	166.00	121.00
<b>Buick Century</b>	<b>1982-96</b>						
<b>OEM Fender</b>		<b>122.67</b>	<b>129.00</b>	<b>136.00</b>	<b>141.00</b>	<b>141.00</b>	<b>141.00</b>
Non-OEM Fender		108.00	108.00	108.00	113.00	113.00	89.00
<b>Ford Escort</b>	<b>1991-96</b>						
<b>OEM Fender</b>		<b>171.45</b>	<b>180.02</b>	<b>180.02</b>	<b>121.55</b>	<b>190.61</b>	<b>190.60</b>
Non-OEM Fender		79.00	79.00	65.00	68.00	79.00	51.00

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167. See AAI, COST HISTORY, *supra* note 139.

## APPENDIX C

Comparison of Standard Policy Price and OEM Policy Price<sup>168</sup>

	Average Standard Policy Price	Estimated OEM Policy Price	Difference in Price
<b>1999 Ford Taurus LX</b>	<b>\$390.89</b>	<b>\$445.58</b>	<b>\$54.69</b>
1998 Dodge Grand Caravan ES	\$420.32	\$481.91	\$61.59
<b>1997 Honda Accord</b>	<b>\$419.00</b>	<b>\$520.40</b>	<b>\$101.40</b>

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168. See AAI, CURRENT COSTS, *supra* note 137; *see also supra* text accompanying notes 153-55.